EDITOR'S NOTE

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

MICHAEL J. SCARFIA,

Petitioner,

v.

TRAVELERS INDEMNITY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

PATRICK D. DOHERTY
Patrick D. Doherty, P.A.
619 Turner Street
Clearwater, Florida 34616
(813) 443-0405
Attorney of Record for Petitioner

and

LEO H. MEIROSE, JR.
Allen & Meirose, P.A.
Suite 340, 4830 W. Kennedy Boulevard
Tampa, Florida 33609

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APPENDIX

1. Judgment - August 11, 1994
2. Order and Memorandum - February 2, 1994
3. Final Judgment of Default - March 9, 1992
4. Appeal from the United States District Court for the Middle District of Florida On Petition for Rehearing - September 20, 1994
5. Order on Motion for Stay Pending Appeal - December 23, 1988
6. Motion for Leave to Appeal Order Scheduling In-Camera Hearing on Plaintiff's Motion to Compel - October 17, 1988
7. Order Scheduling In Camera Hearing on Motion to Compel - October 6, 1988
8. Order on In Camera Hearing - September 20, 1988
9. In Camera Hearing - August 25, 1988
10. Order on Motion to Compel - March 23, 1988

11. Notice of Filing

12. Answer and Affirmative Defenses to Second Amended Complaint Objecting to Dischargeability of Debt - May 1, 1987

13. Second Amended Complaint Objecting to Dischargeability of Debt - March 10, 1987

14. Response to Order on Motion to Compel by Defendant (as referenced in Petition and located in sealed documents. See No. 15 of the Index to Appendix) - April 22, 1988

15. Sealed Documents, currently located at United States District Court, Middle District of Florida, Tampa Division, Clerk of the Court, as sealed Supplemental Volume Case No. 92-00718-CIV-T-23A

16. 11 U.S.C. § 523

17. Rule 7001. Scope of Rules of Part VII.

18. Rule 10. Considerations Governing Review on Writ of Certiorari

APPENDIX 1

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-2335

Non-Argument Calendar

D.C. Docket Nos. 86-1642-8B7

and 92-718-CIV-T-23A

MICHAEL J. SCARFIA,

Debtor.

MICHAEL J. SCARFIA,

Plaintiff-Appellant,

versus

TRAVELERS INDEMNITY CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

Before KRAVITCH, BIRCH and DUBINA, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District

of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 11, 1994

For the Court: Miguel J. Cortez, Clerk

By: Matt Davidson

Deputy Clerk

ISSUED AS MANDATE: OCT 07 1994

APPENDIX 2

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

IN RE:

MICHAEL J. SCARFIA,

Debtor,

MICHAEL J. SCARFIA, NO. 92-0718-CIV-T-23A

Appellant,

v.

TRAVELERS INDEMNITY COMPANY,

Appellee.

O R D E R

In accordance with the memorandum contemporaneously filed, this appeal is dismissed.

L. Clure Morton

SENIOR U.S. DISTRICT JUDGE

2-2-94

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

IN RE:

MICHAEL J. SCARFIA,

Debtor,

MICHAEL J. SCARFIA, NO. 92-0718-CIV-T-23A

Appellant,

v.

TRAVELERS INDEMNITY COMPANY,

Appellee.

M E M O R A N D U M

In this appeal from the United States Bankruptcy Court, Middle District of Florida, Tampa Division, the findings of the Bankruptcy Judge are hereby affirmed and adopted herein as fully as if copied verbatim. The appeal is dismissed. An appropriate order will be entered.

L. Clure Morton

SENIOR U.S. DISTRICT JUDGE

2-2-94

APPENDIX 3

UNITED STATES BANKRUPTCY COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

IN RE:

MICHAEL J. SCARFIA, CASE NO. 86-1642-8B7

Debtor CHAPTER 7

****

THE TRAVELERS INDEMNITY CO.,

Plaintiff,

vs. ADV. PROC. NO. 86-571

MICHAEL J. SCARFIA,

Defendant.

_____/

FINAL JUDGMENT OF DEFAULT

THIS CAUSE came before the Court at Pretrial Conference, there pending a Motion for Extension of Time to File Witness and Exhibit Lists and Motion for Entry of Final Judgment of Default filed by the Plaintiff for the failure of the Defendant to answer questions at a duly scheduled deposition, the

Court finding that the Court previously issued an Order directing Debtor to testify at a deposition, and that the Debtor failed to comply with the Court's Order, that the Defendant waived his Fifth Amendment right to answer questions at a deposition, that the Plaintiff has been prejudiced by the failure of the Defendant to answer such questions, it being appropriate to sanction the Defendant for such conduct, it is therefore,

ORDERED, ADJUDGED and DECREED that:

1. The Motion for Extension of Time to File Witness and Exhibit List is denied as moot.

2. The Motion for Entry of Final Judgment of Default be and it is hereby GRANTED.

3. The Answer, defenses and other pleadings filed by the Defendant herein are hereby stricken, and the allegations of the Complaint are hereby deemed admitted.

4. A Final Judgment of Default be and it is hereby entered in favor of the

Plaintiff, The Travelers Indemnity Co., against the Defendant, Michael J. Scarfia, determining that the claim of the Plaintiff is hereby deemed to be a non-dischargeable claim against the Defendant.

5. The Plaintiff shall have thirty (30) days from the date hereof within which to submit an Affidavit of Damages setting forth the amount of the claim against the Defendant. In the event that the Plaintiff files such an Affidavit within the applicable time period, then this Court will enter a further Final Judgment as to damages setting forth the amount of the non-dischargeable claim against the Defendant.

DONE and ORDERED at Tampa, Florida on MAR 09, 1992.

THOMAS E. BAYNES, JR.
U.S. BANKRUPTCY JUDGE

Conformed copies to:
Debtor
David W. Steen, Esquire - Atty for Plaintiff
Robert P. Polli, Esquire - Atty for Defendant

Leo H. Meirose, Jr., Esquire - Atty for Defendant

Daryl J. Brown, Esquire - Atty for Plaintiff

Office of the U.S. Trustee

Mark D. Hildreth, Esquire - Atty for Defendant

Charles Medearis - Trustee

Allan C. Watkins - Attorney for Trustee

APPENDIX 4

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 94-2235

MICHAEL J. SCARFIA,

Debtor.

MICHAEL J. SCARFIA,

Plaintiff-Appellant,

versus

TRAVELERS INDEMNITY CO.,

Defendant-Appellee.

Appeal from the United States District Court

for the Middle District of Florida

ON PETITION(S) FOR REHEARING

( )

BEFORE: KRAVITCH, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Michael J. Scarfia, is denied.

ENTERED FOR THE COURT:

United States Circuit Judge

9-20-94

APPENDIX 5

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

IN THE MATTER OF:

MICHAEL SCARFIA Case No. 96-1642-8B7

Debtor

TRAVELERS INDEMNITY COMPANY,

Plaintiff,

v. Adv. No. 86-571

MICHAEL J. SCARFIA,

Defendant./

ORDER ON MOTION FOR STAY PENDING APPEAL

DEFENDANT-DEBTOR, Michael J. Scarfia's Motion for Stay of the bankruptcy court's order of October 6, 1988 (Order Scheduling In-Camera Hearing on Travelers' Indemnity Company's Motion to Compel Deposition of Michael J. Scarfia) came on to be heard in the regular course, and the court being fully apprised in the matter, and argument having been entertained by counsel for the respective parties in this matter, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Stay the bankruptcy court's order of October 6, 1988 pending the outcome of Defendant's appeal in this matter be, and is hereby,

GRANTED.

DONE AND ORDERED this 23rd day of December, 1988, in Chambers, at Tampa, Hillsborough County, Florida.

THOMAS E. BAYNES, JR.

U.S. BANKRUPTCY JUDGE

cc: David W. Steen &
Daryl J. Brown, Attorneys for Plaintiff
Leo Meirose, Jr. &
Bennie Lazzara, Jr., Attorneys for Defendant

APPENDIX 6

UNITED STATES BANKRUPTCY COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

IN re

MICHAEL J. SCARFIA,

Debtor. Case No. 86-1642-BKC-8B7

_____/

TRAVELERS INDEMNITY CO.

Plaintiff,

vs. Adversary No. 86-571

MICHAEL J. SCARFIA,

Defendant.

_____/

MOTION FOR LEAVE TO APPEAL ORDER SCHEDULING IN-CAMERA HEARING ON PLAINTIFF'S MOTION TO COMPEL

The Defendant, MICHAEL J. SCARFIA, (hereinafter "SCARFIA"), Debtor herein, by and through his undersigned attorneys, brings this his Motion for Leave to Appeal the Bankruptcy Court's Order of October 6, 1988, scheduling an in-camera hearing in the

presence [sic] of a court reporter on December 6, 1988 at 3:00 P.M., pursuant to 11 U.S.C. Rule 8004, and in support thereof would show unto this Honorable Court the following:

I. STATEMENT OF FACTS.

The Debtor in this case filed his original Petition in Bankruptcy on or about April 25, 1986. On the same date, C.M. Systems, Inc., a company whose court filings reveal that SCARFIA was the president thereof, filed a Chapter 11 Petition.

On March 25, 1986, Terramar Mining Corporation filed its Chapter 11 Petition in the Bankruptcy Court for the Middle District of Florida.

SCARFIA appeared at the first meeting of creditors of C.M. Systems, Inc. on May 28, 1986, and fully testified about the affairs of C.M. Systems, Inc.

Subsequently, in June of 1986, SCARFIA appeared at his own Chapter 11 341 meeting and testified fully about his own affairs.

At both of these meetings, attorneys for creditors were on notice, appeared and examined SCARFIA.

A creditor of Terramar Mining Corporation filed an Emergency Motion to Appoint Trustee in that proceeding, which motion hearing was held on October 10, 1986 during which various accusations were made against SCARFIA, personally and against Mr. Max Mitchell. This was in In Re Terramar Mining Corporation, Case No. 86-1143 (Bktcy, M.D. Fla. 1986).

At the time of these hearings, no criminal investigation had been initiated. A trustee, Mr. George Hadley, was appointed.

Shortly thereafter, the creditors in the C.M. Systems, Inc. bankruptcy moved on an emergency basis for appointment of a trustee and a trustee was appointed on or about November 18, 1986.

At some point during or after the Terramar Mining Corporation Trustee Hearing (October 10 and 13, 1988), the undersigned

counsel was informed by Mr. David Steen and Mr. Chuck Tatelbaum, attorneys for creditors in this proceeding, that a letter had issued from the United States Bankruptcy Court for the Middle District of Florida to the effect that an investigation should be initiated relative to SCARFIA and Mr. Mitchell, relative to their pre- and post-petition behavior. This letter issued as a direct result of the aforementioned hearings.

It was also confirmed by both Mr. Steen and Mr. Tatelbaum to the undersigned counsel that the investigation was indeed ongoing an that Mr. Steen and Mr. Tatelbaum had both conferred with the Federal Bureau of Investigation. Subsequent to the initiation of the investigation as reflected hereinabove, SCARFIA converted his individua Chapter 11 case to a Chapter 7 liquidation, and he subsequently invoked his rights under the Fifth Amendment to the U.S. Constitution

The Travelers Indemnity Co., which has filed a Complaint objecting to the

dischargeability of a certain debt owed to it by Michael J. Scarfia, scheduled the deposition of Michael J. Scarfia for July 13, 1987. Mr. Scarfia appeared at that deposition and refused to answer any questions other than his name, claiming his rights under the United States Constitution, pursuant to the Fifth Amendment thereof. Thereafter the Bankruptcy Court entertained in a Motion to Compel Mr. Scarfia's testimony in that deposition and ultimately the Bankruptcy Court entered an Order scheduling an in-camera hearing on the Motion to Compel the deposition testimony of Mr. Scarfia. An in-camera hearing was scheduled by Order of the Court which is attached hereto as Exhibit "A", for the purpose of affording the Debtor an opportunity to testify as to why his responses to questions asked at the deposition would have posed a danger of incrimination. At that hearing the Debtor objected to the presence of the Court Stenographer. The Court overruled the

objection, continued the hearing, and directed the Debtor to submit a proposed order so that upon its entry, the Debtor could file a Notice of Appeal.

From that Order Debtor appeals.

II. STATEMENT OF RELIEF SOUGHT.

The Defendant, Debtor herein, seeks relief from the Order identified as Exhibit "A", inasmuch as the Order constitutes an impermissible invasion of the rights of the Defendant, as guaranteed to the Defendant, pursuant to the Fifth Amendment of the United States Constitution. The Defendant, by complying with the Court's order will be required to offer testimony which will be transcribed and such compelled testimony of the Defendant which has been ordered by the Bankruptcy Court will very likely be utilized by the government as a crucial link in the chain of evidence in pending criminal prosecutions contemplated by the government with respect to the Defendant. As noted previously in this Motion, the Defendant's

apprehension of such criminal prosecution is substantial, real, imminent and borne out by the facts surrounding this particular bankruptcy matter. Defendant seeks relief from this Order by way of the District Court's appraisal of the applicability of the Fifth Amendment to the particular factual posture presented by the Defendant in this matter.

III. STATEMENT OF THE REASONS WHY AN APPEAL SHOULD BE GRANTED.

The Debtor, SCARFIA's, apprehension of a real, imminent and likely criminal prosecution gives rise to his claim of privilege under the Fifth Amendment, U.S. v. Paris, 812 F.2d 471 (9th Cir. 1987). The testimony sought pursuant to Plaintiff's Discovery Request and the Court Order has a substantial likelihood of forming the foundation of criminal charges which will evolve from the present ongoing investigation of the Defendant being conducted by the

F.B.I. and the United States Attorney's Office. As such, this testimony has a strong likelihood of being utilized by the government to incriminate the Defendant in an ongoing Criminal investigation. The testimony sought is clearly within the ambit of Fifth Amendment protection. National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987); In Re Grand Jury Proceedings, 814 F.2d 791 (1st Cir. 1987). Additionally, the testimony ordered, even in an in-camera fashion, will conceivably be utilized to forge a vital link in the criminal charges presently being assembled by the Plaintiff and the government.

Thus, under the rationale of the myriad of cases construing the Fifth Amendment privilege, Plaintiff must be prevented from compelling the Defendant to participate in the creation of his own charging instrument. An appeal of the Order in question is mandated in that appellate clarification is necessary to prevent the Defendant from

surrendering important constitutional safeguards, the loss of which would be beyond any remedy.

WHEREFORE, the Defendant, MICHAEL J. SCARFIA, by and through is undersigned attorneys, prays this Honorable Court to grant the Defendant's Motion For Leave to Appeal the Court's Order scheduling an in-camera hearing for the taking of Defendant's testimony.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Roberta Colton, Esquire, Trenam, Simmons, Kemker, Scharf, Barkin, Frye, O'Neill, P. O. Box 1102, Tampa, Florida 33601-1102, this 14th day of October, 1988.

Leo H.Meirose, Jr., Esq.
Battaglia, Ross, Hastings
and Dicus
A Professional Association
980 Tyrone Boulevard

Post Office Box 41100

St. Petersburg, Florida 33743

(813) 381-2300

Florida Bar #239315

Attorneys for MICHAEL J.

SCARFIA

APPENDIX 7

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

In the Matter of:

MICHAEL J. SCARFIA Case No. 86-1642-8B7

Debtor(s)

TRAVELERS INDEMNITY COMPANY

Plaintiff(s) Adv. No. 86-571

v.

MICHAEL J. SCARFIA

Defendant(s)

ORDER SCHEDULING IN CAMERA HEARING

ON MOTION TO COMPEL

THIS CAUSE came on for consideration upon an objection raised by the Debtor at an in camera hearing held on August 25, 1988. In accordance with In re Connelly, 59 B.R. 421 (Bankr. N.D. Ill. 1986), an in camera hearing was scheduled by order of this Court entered on March 23, 1988 for the purpose of affording the Debtor an opportunity to testify as to why his responses to questions

asked at a deposition would have posed a real danger of incrimination. At the hearing, the Debtor objected to the presence of the court stenographer. This Court overruled the objection, continued the hearing, and directed the Debtor to submit a proposed order so that upon its entry, the Debtor could file a notice of appeal. Inasmuch as the Debtor has not complied with this Court's directions, it is appropriate to enter this Order.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED the Debtor's objection to the presence of the court reporter at the in camera hearing be, and the same is hereby, overruled. It is further

ORDERED, ADJUDGED AND DECREED that upon no notice of appeal being filed within 10 days of this Order, in accordance with Bankruptcy Rule 8002, the Debtor shall appear in an in camera hearing on Plaintiff's Motion to Compel on December 6, 1988 at 3:00 p.m.

At that time the Debtor shall be afforded another opportunity to testify in camera to show why his responses to the questions asked at deposition would have posed a real danger of incrimination.

DONE AND ORDERED in Tampa, Florida this 6 day of October, 1988 [sic].

THOMAS E. BAYNES, JR.
U.S. Bankruptcy Judge

cc: David W. Steen & Daryl J. Brown
Attorneys for Plaintiff
Leo Meirose, Jr. & Bennie Lazzara, Jr.
Attorneys for Defendant.

I CERTIFY THAT THIS ORDER WAS SERVED BY U.S. MAIL TO PARTIES AS LISTED ON

October 6, 1988 (Date)

By Deputy Clerk S.P.

APPENDIX 8

UNITED STATES BANKRUPTCY COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

In Re:

MICHAEL J. SCARFIA Case No. 86-1642-8B7

Debtor. Chapter 7

_____/

THE TRAVELERS INDEMNITY COMPANY,

Plaintiff, Adv. Pro. No. 86-571

v.

MICHAEL J. SCARFIA, JR.,

Defendant.

_____/

ORDER ON IN CAMERA HEARING

THIS CAUSE CAME before the Court at an in camera hearing to review documents previously submitted to this Court and to examine the Defendant with respect to responses to questions posed by the Plaintiff and with respect to documents previously submitted to this Court under seal, there

appearing David W. Steen, Esquire for The Travelers Indemnity Company, and Leo Meirose, Esquire, and Robert Polli, Esquire, for the Defendant, the Court having heard argument of counsel and being otherwise duly advised in the premises, finds that it is appropriate to allow the in camera hearing to continue and to exclude the attorney for The Travelers Indemnity Company in that the Fifth Amendment privilege may be violated, it is accordingly

ORDERED, ADJUDGED AND DECREED that:

1. The in camera hearing to review documents and to question the Defendant shall proceed without presence of the counsel for the Plaintiff.

2. This Court specifically reserves the right to determine if the Defendant may continue to defend the action under Section 523 of the Bankruptcy Code while refusing to answer questions based upon his Fifth Amendment constitutional privileges.

DONE AND ORDERED at Tampa, Florida on September 20, 1988.

THOMAS E. BAYNES, JR.

Bankruptcy Judge

Copies to:

David W. Steen, Esquire

Leo Meirose, Esquire

Robert Polli, Esquire

Daryl J. Brown

Bennie Lazzara, Jr.

I CERTIFY THAT THIS ORDER WAS SERVED BY U.S. MAIL TO PARTIES AS LISTED ON 9-20-88 (Date)

By Deputy Clerk S.P.

APPENDIX 9

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

IN RE:

MICHAEL SCARFIA, CASE NO. 86-1642-8B7

Debtor.

IN CAMERA HEARING

BEFORE: Hon. Thomas E. Baynes, Jr.,

Bankruptcy Judge.

DATE: August 25, 1988.

TIME: 1:30 PM.

PLACE: U. S. Bankruptcy Court.

Courtroom 215,

4921 Memorial Highway,

Tampa, Florida 33634.

REPORTED BY: Sheila Keen,

Official Court Reporter.

APPEARANCES:

MR. DAVID STEEN, ESQUIRE

Old Hyde Park

505 South Magnolia Avenue

Tampa, Florida 33606

Attorney for Plaintiff

MR. LEO H. MEIROSE, JR., ESQUIRE

Battaglia, Ross, Hastings,

Dicus and Andrews

980 Tyrone Boulevard

St. Petersburg, Florida 33740

Attorney for Defendant

MR. ROBERT POLLI, ESQUIRE

Lazzara, Caskey, Polli,

Gillick and Paul

606 Madison Street, Suite 2001

Tampa, Florida 33602

Co-counsel for Defendant

P R O C E E D I N G S

THE COURT: Please be seated.

This is the in camera hearing on the Travelers Indemnity Company vs. Scarfia. One note, I have looked over the documents that were placed in camera which have been in the safe at the clerk's office, I took out last night, and I can assure the Debtor that no

one else has seen those except me, no one here, including my law clerk, my secretary, or the court reporter, et cetera.

I would say other than possibly the responses of the Debtor and the affidavit, the other materials are available to everybody else. Those happen to be transcripts of Mr. Rawls, including the 341 meeting. So there is nothing in there.

I have also looked over the deposition taken by Mr. Steen on July the 31st, which was of course were responses which were objected to on the grounds of the Fifth Amendment.

Now this hearing is in response to my previous order dated March the 23rd regardi the claim of Mr. Scarfia. I point out I don't know whether Mr. Meirose and Mr. Steer have gone back and read Litton and Litton. That decision is very good about getting us this far and then sort of stops.

However, I point out in my order -- by the way, we are locked in here so if there

a fire, we can run out my door. I just wanted to make you feel safe, Mr. Meirose.

MR. MEIROSE: Good, we will leave Mr. Steen in here.

THE COURT: That was the only way I could do this and put you in camera. It's easier to do it here.

Anyway, the requirements of Litton suggest that the Debtor demonstrate a reasonable cause to fear prosecution. Of course, first is the fear of criminal prosecution to be sufficient to support an assertion of privilege, and second, does it, in responding, require in his proceeding to present some real danger of incrimination? And, of course, the real criteria of the possibility rather than the likelihood of prosecution. And that is what we are here for today.

I want to assure Counsel that I am not planning to sit here and do a new deposition of Mr. Scarfia because there have been certain answers. And I would point out, at

least, Mr. Meirose, my opinion of your responses and I will have it for the record, the responses of April 22nd --

MR. MEIROSE: Your Honor, at this time I think at this point, we would want to argue the point as to whether Mr. Steen should be allowed to stay.

THE COURT: I am not going to say anything about the responses. I just wanted to say that I have the responses and I have the affidavit and the responses. There are statements of why the Debtor believes the invocation of the Fifth Amendment is proper. I might say after reading them and what depositions were related and also the 341 meeting of C.M. Systems, if I am not mistaken, that I did not think the responses in and of themselves met the burden suggested by Litton.

And with that, of course, comes the question you were just rising to, Mr. Meirose -- that is, the right of Mr. Steen to be present in the in camera hearing.

And, Mr. Steen, I think I expressed before my concern and once the, you know, the cat is out of the bag, at this point you are never going to get the cat back in again. In theory, I can always allow you to stay. Of course, if I am wrong, they take it up on appeal, and the whole thing goes down the tube. I will let you make whatever argument you have why you should be here to hear these questions or at least the answers to some of the questions I may have.

MR. STEEN: First of all, Your Honor, I think the controlling case is not the Litton case ut the Walsh Trucking Company case, which specifically talks about dischargeability cases.

THE COURT: Do you have a cite there?

MR. STEEN: The case is called In Re: Walsh Trucking Company, and it is at 67-B.R., Page 863.

THE COURT: Well, let me point out, if I remember all of Litton correctly, Litton doesn't really talk about the question of

dischargeability or what the issue is. It basically tries to get the Judge through the Fifth Amendment, and then trying to determin what the effectiveness is.

MR. STEEN: Correct, but my point is th initial process has to do with whether or no the Fifth Amendment can be raised in connection with objections to a discharge case, as in the Litton case. In the Walsh case, the Court recites there is no right to raise the Fifth Amendment in a dischargeability case under 523. The Debtor has a choice of defending it or not defendin it. It is not an objection to his discharge per se. It's not protected by 727, and he does not have the right to raise the Fifth Amendment.

So I think the Court should take a look at that case and determine whether or not this whole process should even apply to the 523, vs. the case under 707, which had to deal with turnover of documents. For a trustee in bankruptcy or denial of discharge

in that case, of course, the Debtor has an absolute right to raise the Fifth Amendment and not as long as there is some reasonable relationship between what is asked and what may incriminate him.

First, a 523 case which has nothing to do with the denial of discharge under 727 --

THE COURT: On the other side of the coin, in due caution, wouldn't it be wiser to do it in camera, hear what's in camera, determine two things at that time: A, does the Fifth Amendment -- can you raise the Fifth Amendment under 523; and if the answer is no, then you go no further and you give an order compelling. On the other hand, if you decide the Fifth Amendment can be applied, then it goes to the Litton stage and says, has he stated or shown that there is that concern which rises to the right to file a Fifth Amendment?

MR. STEEN: This is a big enough room, Your Honor, that I don't feel nervous being locked in here with Mr. Meirose. However, I

think if the Court were to find it does not apply, of course there would be nothing -- no necessity to go further in determining whether I should be here. He can raise that as an objection to my questions. So that would be my first grounds. They don't even have that process available to them under this scenario.

Secondly, I think -- in essence, I think the Court has done an in camera review. There has not been an in camera hearing but it has done a review of the documents submitted confidentially by the Defendant. And with respect to the review, I would agree with the Court in an abundance of caution, it ought to be done by the Court alone and with no other eyes on those documents.

However, now that the Court has seen those documents and even if the Fifth Anendment were appropriate in a dischargeability case, I think the Court can determine that some of those things are not privileged because either they're public

record or B, that they may have been revealed through another source other than the Debtor's attorney, and that even if the Creditor could raise the Fifth Amendment, a lot of that information probably is not confidential. It's information which has already been released in front of other parties, and I feel I ought not be excluded from the discussions about those documents.

THE COURT: We are here on a motion to compel, and answers to a deposition, not one to produce. It takes on a different role.

MR. STEEN: But they chose to answer by virtue of producing these documents.

THE COURT: None of these that have been produced here do I consider to be in camera documents. There is nothing in here.

MR. STEEN: That is what they are considering them to be.

THE COURT: Before we go ahead here, what I have received here -- other than the responses which I don't count as a production, I have a deposition here, and if

they have been -- and if they're depositions which have been transcribed, I think they sort of have lost any flavor of the Fifth Amendment. But I think everybody would have one of these.

MR. STEEN: Well, that's the thing. I don't know what has been submitted to the Court. Everything was submitted ex parte an under seal. And the first thing I ought to be aware of is what has been submitted to th Court.

THE COURT: I will tell you what has been physically submitted to the Court. As requested by my order, there was an affidavi by Mr. Scarfia saying what his responses are true and correct. There was responses to th interrogatories, deposition questions of you deposition. I have a copy of a transcript C. M. Systems, which appears to be the 341 meeting of May the 28th, 1986. I have a hearing before Judge Paskay on October the 13th, 1986, and also Tier Mining Corporatio and that would be 86-1143. I have an earli

hearing which is the hearing of October the 10th, 1986, and that's in the same case.

I have a deposition in C. M. Systems, Inc., of Mr. John Rawls. I have a 2004 examination of Max Mitchell. I have a deposition of -- it looks like Lewie, L-e-w-i-e, and these are all of the C. M. Systems people. It is a Lewie Hunter. I have another 2004 exam of Max Mitchell, one being September 16th and the other being September the 25th, 1986. None of these I can see suggest in and of themselves are privileged. That is why I said everybody has a copy of these. And if they don't, they can ask for them or get them out of the court file.

MR. STEEN: That is fine, so the only thing that has been submitted in writing, as I understand it, is the statement or affidavit from Mr. Scarfia?

THE COURT: There is a separate physical affidavit saying what the responses are, which are basically the responses that is formulated in the questions you posed in your

deposition. I assume Mr. Meirose wrote that response out, and Mr. Scarfia has an affidavit saying they're true and correct.

MR. STEEN: One of my arguments would be as to the extent those responses have already been stated in prior documents or they refer to prior documents or other hearings and depositions. I don't see where they could fall within the --

THE COURT: I don't think he is saying these documents are privileged. These were in support of the documents that I requested.

MR. STEEN: Well, I don't know what was said but I am saying now to the extent the Court has made a determination after the in camera review that certain of the responses do not fall within the --

THE COURT: Within Litton to support the criteria of Litton, but Litton even suggests that it's up to the Debtor to present that information. And that is why I had a hearing, so Mr. Scarfia can testify as to any questions I have.

MR. STEEN: But is seems that if the Court can make a determination that some of the items responded to do not fall within the privy of the Fifth Amendment --

THE COURT: Well, on the other side of that coin is the loose cat trick. In other words, if Mr. Scarfia answers any questions, does that waive his entire right to the Fifth Amendment? And that is the concern.

MR. STEEN: That is the position they're taking.

THE COURT: And that is at least an arguable position.

MR. STEEN: I am not, you know, Your Honor, criticizing them. If I were a criminal lawyer, I would give that advice to my client.

THE COURT: Civil lawyers to it sometimes, too.

MR. STEEN: That's correct, Your Honor, but what I am suggesting, I guess in the first determination, is whether or not the Fifth Amendment can be raised under the 523

complaint because I don't think Litton stands for that. I think it sets up a process where there is a problem with the discharge. It says the Debtor has a constitutional right to raise the Fifth Amendment.

523, on the other hand, does not avail the Debtor of the right. If he wants to defend the action, he has to defend it.

THE COURT: Wouldn't you say that Walsh would probably go a little different and say, you have a Fifth Amendment right. If you fail to exercise it, you're penalized.

MR. STEEN: That is where we were in the Max Mitchell case where that Debtor did the same thing. We had a similar complaint against Mr. Mitchell. He failed to respond. We moved to compel. He failed to answer the motion to compel, and the Court struck all his pleadings and entered a judgment of dischargeability.

It seems to me this is an identical situation. We raised the same case as the Walsh case. The process set forth in Litton

is a good process under 727, but I don't think it applies to a case under 523.

THE COURT: Well, I understand your point in saying that, but my great concern has always been in not lousing up the whole situation at the ground level. I still have visions in my mind, after having tried a case the second time around out of an appeal, I don't know what it's like to hear it again as a Judge, but it sure is hell trying it again after you have won it the first time and have to come back.

MR. STEEN: I agree, Your Honor. I understand the Court's caution in a situation like this where there is a possibility of a criminal prosecution.

THE COURT: For instance, I am not even concerned about the criminal prosecution per se. What I am concerned about is this scenario, and that is I make a ruling and say Mr. Scarfia, you answer all the questions. We come back here, I grant the motion to enter a default. A default is entered. It

goes up on appeal at the District Court. It sits in the District Court for a year-and-a-half. The District court says, no, Baynes, you're wrong. It comes back here, and we do the whole process over. I think it's sheer insanity to do it that way when you have an opportunity at first blush to give everybody a chance to go through the hearing, set the record. I believe setting the record the first time around assists both the Court and the Appellate Court in making a determination. Just giving you my thoughts on it.

MR. MEIROSE: I would just give a brief response. Initially, of course, we have already argues the Walsh case, the Litton case, and also we have argued the Conley case. The Conley case basically says absent the agreement of immunity, the Debtor may properly assert his Fifth Amendment rights and retain his right to be discharge, period. It's 59-B.R. I am citing from Page 430. It's already been submitted to Your Honor.

I would submit Your Honor has already taken the correct path in the matter by rejecting Walsh. Now you heard this argument before. Now here is the difficulty -- we are in a unique situation. There is something we have already filed in camera. We just cam up with the Bank of Holiday case, and I will submit that to Your Honor.

(Tenders documents to Court.)

MR. MEIROSE: And what I would submit is not, with all due respect --

THE COURT: I assume this is being submitted in camera, so you are not giving it to Mr. Steen?

MR. MEIROSE: That's correct. However, what Your Honor will see from the attachments will support the position I am taking, that this is a unique situation in that the conversations with the attorneys for various creditors in this case is indeed a conversation directly with the United States Attorney's Office, and that is one thing that makes the situation extremely unique.

This is a situation where the creditors have banded together and they are creating this situation with the United States Attorney's Office. In fact, that is why the situation exists.

Now, Your Honor, I have submitted that to Your Honor. Your Honor can review that. If you review the first attachment itself --

THE COURT: I think the point that you're raising by this in camera item -- and let the record reflect that this is another document which has been filed of this date regarding certain correspondence and notices of filings and are attached to the correspondence which are four pieces of correspondence, literally letters, dated October 29th, 30th -- excuse me, that would be October 29th, October 22nd, and October 30th, also November the 6th. Just so we have a record somewhere in this world.

MR. MEIROSE: And the thing is, again quoting from the Conley case, and I quote from the same page, 430, there is a

threshhold required for a proper showing of the Fifth amendment privilege. It is the same thing that is the rule. The point is you don't invite the conduit, or one of the conduits to the United States Attorney's Office, to the party. You just don't do that. And that is what we are talking about in terms of the context with the United States Attorneys, meaning nothing personal at all to Mr. Steen.

THE COURT: Mr. Meirose, wouldn't you even go on to say that even if we had the local plumber sitting in this courtroom and not Mr. Steen, and he heard it, the same thing would apply, would it not? He would be able to be subpoenaed and testify to what he heard.

MR. MEIROSE: No, it's different because the items that have been submitted clearly show have been presented previously. There is an active ongoing matter which is being encouraged freely for the purpose of

obtaining the investigation for the benefit of these adversary proceedings.

THE COURT: I understand that, Mr. Meirose. But whether they are actively involved or not, anyone who appears at this hearing is capable of testifying as to what was said at the hearing, whether or not they're the creditor involved or not or the plumber. You still let the cat out of the bag at an in camera hearing if someone is there who can be subpoenaed to testify.

MR. MEIROSE: The only problem with that, Your Honor, is of course that it's not a matter of capability, it's a matter of fact that this is being done, and that is the real difference.

But the point is Walsh does not apply; Conley does. Who is going to make the argument that the Fifth Amendment to the United States Constitution does not exist in a bankruptcy proceeding? The question is, does the Fifth Amendment properly exist and is it properly invoked, and that is the point

that you, Your Honor, stepped up to in drafting the order as Your Honor did.

Let me say something else about the Max Mitchell situation. It's not the same animal. Max Mitchell never showed up, never asserted this kind of thing; just didn't show up. Said, the heck with it. It's a different situation.

MR. POLLI: Your Honor, my name is Robert Polli. I am a criminal defense lawyer with Gillick and Caskey and Polli. I have been at a side table across from Mr. Meirose for the last couple of years. We have tried to give him some encouragement on this argument, and he has done a fine job.

I believe, Your Honor, this is a high bred situation because of the letters that were provided to Your Honor in camera. There is not a specter of criminal investigation. There is, in fact, on ongoing criminal investigation; that puts us in a different category. And I may have more to say on that.

MR. MEIROSE: Perhaps, Your Honor, it might be helpful to review those, to take a few minutes and just review them.

THE COURT: I think I have got the gist of some of those hints earlier.

MR. STEEN: Your Honor, I think it's improper for more ex parte things to be presented to the Court without the Court's request, for the Court to consider additional in camera documents.

THE COURT: If I am going to have Mr. Scarfia take the stand, I am sure I can see other pieces of documents up here.

MR. STEEN: I just think it's improper to submit to the Court ex parte --

THE COURT: That's the problem with these in camera hearings. It only goes to the Fifth Amendment.

MR. STEEN: What was requested is not what was presented here today so far as I can tell.

THE COURT: Well, if I find it is not proper, then I might release it. And I might

point out, it is not correspondence of the Debtor.

MR. STEEN: In that case, I particularly would object for it being submitted ex parte.

THE COURT: All right. I recognize your objection.

MR. MEIROSE: I think we may have submitted this before. It's just in that pile of things. I know it's been submitted in the Bank of Holiday case.

MR. STEEN: One other thing as a legal matter, the Conley case, the 727 situation which deals with objections to discharge. If I could just quote very briefly from the Walsh case, I can crystalize the issue on Page 865. And it would be the third paragraph down where it says, Congress, in drafting the Bankruptcy Code 11 U.S.C., Section 101, took a careful look at the issue and made specific determinations that the failure to testify would prevent a discharge only after the Debtor had been granted immunity. And that cite, Your Honor, is 11-

U.S.C.-Section 727-A, and 6. Under 6B of that provision, it was made clear that the discharge could only be denied if immunity had been granted under the provision of 11 U.S.C.-344. Immunity could be granted for the purposes of submission to examinations. With respect to discharge of particular debts, no such provision exists. As a result, it is clear the privilege may not be used to prevent the declaration of nondischargeability as to a particular debt. And that is the bottom line as far as the Bankruptcy Code is concerned.

There is no provision under 523 for raising the Fifth Amendment. Sure, you have a Fifth Amendment right but --

THE COURT: We have got a situation here where we have one or two or three little cases sitting out there at the Bankruptcy Court level that have these pre-announcements. And as you know quite well, bankruptcy courts are not faced with these

criminal -- or these types of constitutional questions.

MR. STEEN: This case was involved with that issue.

THE COURT: I am not saying the cases; it's the level of which this point has been discussed.

MR. STEEN: All I'm suggesting to the Court is the only case that has been cited -- and that's the only two other cases don't even address this issue. All they talk about is under 727. Where we have 11-U.S.C.-344 requiring answers or documents to be turned over, that the Debtor can be granted immunity and has to respond.

THE COURT: I don't think I can grant immunity.

MR. STEEN: I don't believe you can either. But I think immunity can be granted, and the Debtor can be required to comply with the trustee or the creditors' request. But there is no provision, and that is under 11-727-06, that there is no provision elsewhere

in the Code which would make that apply to 523.

THE COURT: What about the Supreme Court case which talks about the trustee could waive --

MR. STEEN: That has to do with 727 also. Nothing to do with 523.

THE COURT: Then you would think it would be a lesser concluded issue. If you could do it in 727, you could do it under 523.

MR. STEEN: The code makes that provision under 727-A-6. And there is no such provision under 523.

THE COURT: What I am saying is that you can view it in two points, can't you? And that is under 727 since the Code provides for it, you can do it. But since it doesn't and it's not in 523, you can't, or you can take the position since 523 is a lesser level, which I think is what Walsh Trucking talks about. Therefore, there is a lesser standing there.

MR. STEEN: I don't think so. 727 is the right to Debtor's discharge, and it sets forth certain actions that the Court specifically prohibits the Debtor from doing. 523 is more of a party on party situation, has nothing to do with what the Debtor did versus the Court. It has to do with what the Debtor did as to a third party.

And I think what they're saying is Congress never intended to grant the Debtor the right to defend those actions by raising the Fifth Amendment. Under this provision, 727-A-6, where defending those actions on a one-on-one with a creditor for dischargeability.

THE COURT: On the other side, if Congress wanted to limit the constitutional law, they would have put something in 523. You would not think that Congress would limit -- or it was the intent to limit the application of the Fifth Amendment of the Constitution if they had already thought about it in the 727.

MR. STEEN: I think what Congress intended is the 523 complaint is a one-party versus the other, not the Debtor having violated something the Court prohibits. And is somebody did something fraudulent or won't pay alimony or something, that is nondischargeable. It's like any other civil lawsuit. You can't defend a breach of a lease by raising the Fifth Amendment and just say, I am not answering the questions. At that point, I think the Judge in the State Court is capable of saying, fine, if you don't want to answer the questions, then I will find you did whatever they said you did.

THE COURT: That would be the analogous situation according to you. You disregard the bankruptcy and you go back to the State Court or the Federal Common Law to determine what would happen. Suppose this was a bankruptcy, in fact, where Travelers was suing Mr. Scarfia in the District court on the same right.

MR. STEEN: I think that is somewhat analogous. In fact, there are some 523 actions that can be maintained in the State Court. For example, the dischargeability of alimony and child support. The only reason the others are exclusively held here is that is what the Code has provided. But the Code has made no mention of the Debtor's right to raise the Fifth Amendment or get immunity or anything else. So we think the Debtor reasoning opinion is the Walsh Trucking case. Those other opinions don't even deal with 523. They don't deal with the fact it is a dischargeability action and not a prohibition under 727.

And I also point out two other things. Mr. Meirose mentioned, first of all, this Court did not reject Walsh at a previous hearing.

THE COURT: Well, don't forget, this could be the nature of the game, Mr. Steen. I can come to this conclusion. I can come to the conclusion after hearing Mr. Scarfia

that, number one, is that the Fifth Amendment privileges are not available under 523. And if I do that and Mr. Scarfia will have to make some choices.

But on the other hand, whether that is true or not in this instance because what we are worried about here is not the nondischargeability issue. It's more about the criminality that may take place in the State or District Court. I am talking about the ramifications of it.

MR. STEEN: One other point I would like to bring up at this time. I don't know what has been submitted but there has been no banding together with other creditors to go to the United States Attorney's Office to try and indict Mr. Scarfia.

Secondly, there is an obligation of all judges and lawyers that if they see something that could be criminal, to report it to the United States Attorney. And the failure to do so is a crime itself.

So in my own opinion, if I see a debtor or a creditor doing a violation of Title 18 or any other criminal law, I feel I have an obligation or any other lawyer should contact the United States Attorney's Office and let the United States Attorney determine if there has been a crime committed. I don't know what else has been submitted, and that's all I would like to bring up with regard to what was said.

THE COURT: My ruling then is, Mr. Steen, I am going to allow this to continue in camera without you, all right. And if you wish, you can give me an order on the in camera hearing, that basically the Court, after hearing arguments of Counsel and reviewing the record and files and considering the cases cited by both Counsel, that the attorney for Travelers Indemnity Company was not allowed to continue in presence at the hearing during the testimony of the Defendant, Mr. Scarfia, on this Court's belief that such presence by the

attorney may invade the Fifth Amendment privileges, notwithstanding the Court may later determine the Fifth Amendment may not apply under 523.

If you wish to do that, you can send me an order to that effect. Otherwise, I will just let it stay on the record.

MR. STEEN: Your Honor, I will submit an order.

Thank you, Your Honor, and I will be out of here in a second.

(Whereupon, Mr. Steen, Esquire, exited.)

MR. MEIROSE: Your Honor, we have a couple of items that we want to take up with Your Honor. Is it Your Honor's intention to have this matter on the record, and then what was -- I forgot what you provided the last time.

THE COURT: The provision was the notes and tape will be sealed with the other in camera information.

MR. MEIROSE: The whole thing will be taken under seal?

THE COURT: Oh yes, we will seal it. I don't even have a combination to the safe, so I will seal it.

MR. POLLI: My concern about that is in the event that the Fifth Amendment prevails, we now have a record. In the event it does not prevail and we go on appeal and we win, we now have a record of Mr. Scarfia's responses. I wonder if they're able to be subpoenaed by the District Court if there is a collateral criminal matter?

THE COURT: Well, I can't predict that.

MR. POLLI: You see, it is a concern, Your Honor.

THE COURT: I am the first one to ask that question. If you remember, one of the things we had at the hearing was whether or not to have the court reporter. But I have grave concerns about doing anything without it being on the record. I know they do it in the State Court all the time, but my concern is there is a very, very tough problem with that.

The only thing I could suggest is that if you do feel that way, and that is your choice, I understand your point quite well. I had enough criminal law to appreciate that. But if that is that great of a concern to you, then why don't you pose the objection to the court reporter, putting it on the record, and we will certify it to the District Court -- take it to the District Court, and we will raise it there.

MR. MEIROSE: Then would it be Your Honor's intent to proceed from there?

THE COURT: No, I won't force you to go on the record if you have got that objection outstanding. That is the other problem. We can't put it on the record if you feel it can be subpoenaed because we do the same thing just like Mr. Steen. We keep him here --

MR. POLLI: This is an interesting case. I appreciate your being as cautious as you are, but I have a duty to be that cautious, too.

THE COURT: It does no good to invoke the Fifth Amendment privilege if you go around and anybody can be free to testify. They can't bring me into court and I can always gage the court reporter, but --

MR. POLLI: I would raise the objection at this point then to the in camera hearing being recorded by this court reporter. I don't believe that Your Honor has any ability to be able to seal or guarantee the integrity of Mr. Scarfia's testimony being recorded by this court reporter during this in camera hearing that would probably protect him in the event this ongoing criminal investigation elevates itself to some criminal charges brought by the Federal Law Enforcement.

THE COURT: Well, I will point out to you this is my first in camera hearing. The only two in camera hearings I ever had -- well, I had one previously where all of the attorneys were there. There was a piece of information which was a settlement in District court. The few that I had when I

was practicing, it was before a judge without a court reporter in the State Court, but that was because nobody ever raised an issue of having a court reporter there.

I personally feel, sitting on this bench because of the uniqueness of bankruptcy, that things should be on the record to establish. I understand full well Mr. Scarfia's concern that he does not want to have any evidence of his position.

I point out that I have looked over the documents with the responses to motions to compel and I don't think the responses here in and of themselves answer the questions, but do give some basis for why he wouldn't answer. I don't think as a general proposition, I don't think if this particular document got in the outside world that it would give any of that information, but it might be considered as a waiver which is a concern.

But here we are talking about a much greater level, to a level of him reciting the

basis upon the facts of which may be in effect. If you would like to call it in any other term, it could be a confession or a testimony against interest, or some form of admission, whichever you wish to classify it. It rises above that.

But if we're going to do it in camera, considering the fact it may not apply to 523, and especially considering the fact that notwithstanding the criminality of the point it may have to go up on appeal and there may have to be some record of something being done. As you all know if you have taken things up on appeal, you've always cussed yourselves or your partners for not having that particular thing of record; at least I know I have. But that is my particular concern with this.

I will do this. I will overrule your objection. I will allow you to proceed either one of two ways. You can go ahead and put Mr. Scarfia on and we will hear it, or if you don't think that is in the best interest

of Mr. Scarfia, I will allow you to give me an order on that objection, overruling the objection, specifically setting out. We need to do that for the District Court. The District Court may affirm me, and we would like to have some response legally of this.

MR. POLLI: It would be my advice to my client for him not to testify before this court reporter, in an abundance of caution, and we can take it up and get some direction from the District Court.

THE COURT: In that light, I don't believe right now there is anything on this record of course that would prohibit you, if you wish from getting a transcript of it, to take it to District Court. But I would like to stop it right here if you are going to go up.

One last comment that goes not in any way that would subtract from me considering the issue that Mr. Steen raised as to whether or not 523 does something to defect the Fifth Amendment.

MR. POLLI: Thank you, Your Honor.

MR. MEIROSE: Then I will prepare the order that Your Honor requested and I will get a transcript.

THE COURT: Note on the order of course that my previous order, that the Court ordered Mr. Scarfia to appear and testify, and the Court decided a court reporter should be here. A record should be made of that testimony. Counsel, believing it was not in his best interest, objected. The Court overruled that objection and giving Mr. Scarfia the opportunity to take it up to the District court.

(Whereupon, the proceedings were concluded.)

STATE OF FLORIDA)

COUNTY OF HILLSBOROUGH)

I, SHEILA KEEN, do hereby certify that hearing was held in the case of:

MICHAEL SCARFIA,

at the time and place set forth in the caption hereof; that I was authorized to and

did report in shorthand the proceedings had in said hearing, and that the foregoing pages, numbered 1 to 31, inclusive, constitute a true and correct transcription of my said shorthand report.

WITNESS MY HAND this 6th day of September, 1988, at Tampa, Hillsborough County, Florida.

SHEILA KEEN,

Official Court Reporter

My Commission expires: 3/1/92

APPENDIX 10

IN THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF FLORIDA - TAMPA DIVISION

In the Matter of:

MICHAEL J. SCARFIA Case No. 86-1642-8B7

Debtor(s)

THE TRAVELERS INDEMNITY COMPANY

Plaintiff(s)

v.

MICHAEL J. SCARFIA

Defendant(s)

ORDER ON MOTION TO COMPEL

THIS CAUSE came on for consideration upon the Motion to Compel filed by Plaintiff, Travelers Indemnity Company. The Court reviewed the Motion and the record and heard argument of counsel on November 24, 1987, and finds as follows:

The Debtor/Defendant, Michael J. Scarfia, filed a Petition for Relief under Chapter 11 of the Bankruptcy Code on April 25, 1986. Subsequently, on October 21, 1986, the Chapter 11 case was converted to Chapter

7. On November 17, 1986, Plaintiff filed a Complaint seeking a determination that the Debtor's obligation to Plaintiff pursuant to an indemnity agreement is nondischargeable under Section 523(a)(2) of the Bankruptcy Code. It appears the Plaintiff, as surety for C.M. Systems, Inc. (C.M.), issued construction bonds between November, 1983 and December, 1986. In connection therewith, the Debtor, in his personal capacity, executed an indemnity agreement. Subsequent to obtaining the bonds, C.M. abandoned its construction projects and the Plaintiff's liability under the construction bonds followed. In turn, the Debtor became indebted to the Plaintiff by virtue of the indemnification agreement. The Plaintiff contends the Debtor, as President of C.M., conspired with others to defraud the Plaintiff by concealing and submitting false financial information about C.M., its affiliates and shareholders. This act was allegedly committed with the intent

of inducing the Plaintiff to issue the construction bonds.

Since the inception of this adversary proceeding, the Debtor has remained silent, claiming his privilege against self-incrimination under the Fifth Amendment to the United States Constitution. The Debtor answered the Complaint, denying all allegations and invoking his privilege against self-incrimination. In connection with this adversary proceeding, the Plaintiff scheduled the deposition of the Debtor for May 27, 1987. The Debtor filed a Motion for Protective Order, stating that he intended to invoke his Fifth Amendment privilege against self-incrimination in the event the deposition was held as scheduled. Thereafter, the deposition was rescheduled for July 13, 1987.

The Debtor appeared at the July 13 deposition but again invoked his Fifth Amendment privilege. Nevertheless, counsel for Plaintiff proceeded to ask the Debtor

questions. The Debtor refused to answer each and every question asked except his name. (A copy of the deposition transcript was filed with the Clerk of the Bankruptcy Court on March 116, 1988 and is incorporated herein by reference.) Plaintiff's Motion to Compel, which this Court is now considering, followed.

The Fifth Amendment to the United States Constitution provides, "No person...shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The privilege against self-incrimination applies to bankruptcy cases, although under specific circumstances, its invocation can result in a denial of discharge. Rivoli Grain Co. v. Litton (In re Litton), 74 B.R. 557, 559 (Bankr. C.D. Ill. 1987). Section 727(a)(6) provides,

> (a) The court shall grant the debtor a discharge, unless -

(6) the debtor has refused, in the case - ...

(c) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

Thus, if the privilege against self-incrimination is properly asserted, a discharge will not be denied. Therefore, a review of the scope of the privilege and its proper invocation is warranted.

The privilege applies only when there is "(i) a 'compelled' disclosure, (ii) found to be 'testimonial', and (iii) 'incriminatory'." In re Connelly, 59 B.R. 421, 431 (Bankr. N.D. Ill. 1986). Further, it applies to all civil litigation when the testimony sought might later subject the witness to criminal liability. Litton, supra at 559.

Sustaining a claim of privilege under the Fifth Amendment requires the debtor

demonstrate reasonable cause to fear prosecution. Connelly, supra at 432. "The propriety of [the debtor's] assertion depends on two questions: First, is his fear of criminal prosecution sufficient to support an assertion of the privilege at all? Second, if so, does responding to inquiries in his proceeding present some real danger of incrimination?" Connelly, supra at 432, 433. It is the possibility of criminal prosecution, rather than the likelihood of prosecution, that determines whether there is a real danger of incrimination. In re Corrugated Container Antitrust Litigation, Appeal of Conboy, 661 F.2d 1145, 1150 (7th Cir. 1981), aff'd 459 U.S. 248, 103 S. Ct. 608, 74 L. Ed. 430 (1983). Examples of real danger of prosecution include answers to questions which require an admission of a crime, supplying evidence of a necessary element of a crime and furnishing a link in the chain of evidence needed to prosecute. Connelly, supra at 432. The debtor has the

burden of demonstrating the propriety of his assertion of the privilege. Id. Procedurally, the debtor must come forward with some minimal credible reasons why each of the many disclosures required of him pose some real and not imaginary threat of incrimination. Id. Upon review by the court, the court will require the debtor to answer only if it is clear from a careful consideration of all the circumstances in the case the witness is mistaken and the answers cannot possibly have a tendency to incriminate. Hoffman v. U.S., 341 U.S. 479, 488, 71 S. Ct. 814, 819, 95 L. Ed. 1118 (1951).

The propriety of asserting the Fifth Amendment privilege at a deposition in a bankruptcy adversary proceeding was reviewed in In re Litton, supra. In Litton, the Plaintiff brought an adversary proceeding against the Debtor under § 523(a)(6) which excepts from discharge any debt for willful and malicious injury to property. The

Complaint alleged the debtor removed grain from the Plaintiff's elevator and converted it to his own use. The debtor appeared at a deposition refusing to answer any questions regarding his ownership or sale of grain, invoking the Fifth Amendment privilege. The bankruptcy court found there was insufficient information to sustain the debtor's claim of privilege against self-incrimination. It ordered the debtor to either testify in camera or submit a sealed affidavit demonstrating why his responses to the questions asked would pose a real danger of incrimination.

Similarly, in this case, the Debtor, Michael Scarfia, appeared at his deposition and refused to answer any questions except his name. No explanations were given for asserting the privilege. The information supplied to this Court is insufficient to make a determination as to whether the Debtor sufficiently fears criminal prosecution and whether answering the questions posed at the

deposition present a real danger of incrimination. Therefore, as in Litton, this Court finds it necessary to direct the Debtor to show why his responses to the questions asked at his deposition would have posed a real danger of incrimination.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that Plaintiff, The Travelers Indemnity Company's, Motion to Compel is held in abeyance until such time as it is ripe for decision. It is further

ORDERED, ADJUDGED AND DECREED that the Debtor, Michael J. Scarfia, shall, within twenty (20) days of the entry of this order, file in camera in the chambers of the undersigned bankruptcy judge, his sworn affidavit, stating separately for each question asked in the deposition transcript why responding to the question would cause him to apprehend danger of self-incrimination. The affidavit shall be accompanied by any supporting documentary

evidence and written argument of counsel. It is further

ORDERED, ADJUDGED AND DECREED that, upon request by the Debtor within five (5) days from the entry of this order, this Court shall schedule a hearing to afford the Debtor an opportunity to testify in camera to show why his responses to the questions asked at the deposition would have posed a real danger of incrimination.

DONE AND ORDERED in Tampa, Florida this 23rd day of March, 1988.

THOMAS E. BAYNES, JR.
U.S. Bankruptcy Judge
03-23-88

APPENDIX 11

UNITED STATES BANKRUPTCY COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

In Re: Chapter 7

MICHAEL J. SCARFIA Case No. 86-1642

Defendant, / Adversary No. 86-581

THE TRAVELERS INDEMNITY CO.,

Plaintiff,

v.

MICHAEL J. SCARFIA

Debtor.

NOTICE OF FILING

YOU ARE HEREBY NOTIFIED that the Defendant, MICHAEL J. SCARFIA, by and through his undersigned counsel, hereby files with the Court copies of letters dated October 29, 1986, October 22, 1987, October 30, 1986 and November 6, 1986 in the above cause.

BATTAGLIA, ROSS, HASTINGS,

DICUS & ANDREWS, a

Professional Association

LEO H. MEIROSE, JR., ESQ.

Attorney for Defendant

Kass, Hodges & Massari

October 29, 1986

Mr. Phil Ruff

NCNB National Bank

600 N. Florida Avenue

Tampa, Florida 33602

Re:

Dear Mr. Ruff:

This letter is to summarize the present position with respect to our claims against C.M. Systems and the other entities. By way of summary, C.M. Systems, Inc., Terramar Mining Corporation, Michael Scarfia and Max Mitchell have each filed Chapter 11 petitions in the Bankruptcy Court in Tampa. Southern Masonry Contractors, Inc. has filed a petition under Chapter 7 in Tampa. By operation of law, a Trustee has been

appointed in the Chapter 7 case of Southern Masonry.

On behalf of the bank, we filed Proofs of Claim in each of the cases, with a claim being filed in Terramar based upon the obligation due by C. M. This was done as a result of our investigation of the financial statements that had been issued as well as what we understood the actions of the Debtors to be in that assets were transferred from C. M. to Terramar, as well as there being false financial information provided to the bank.

We then objected to the Disclosure Statement filed by Terramar as part of its Plan of Reorganization in that it appeared to be an attempt to satisfy the Terramar creditors to the exclusion of the C. M. creditors. The Judge sustained our objection and put the Plan on hold. At the same time, we filed a Motion to consolidate the cases of C. M. and Terramar so that the assets of both

would be available to satisfy the debts of both. We believe that the assets of Terramar are sufficient to satisfy the debts of all of the related entities.

We then filed a Motion to appoint a Trustee in the C. M. case. That Motion has been scheduled for hearing on October 29, 1986. On October 9, 1986, the first mortgage holder of Terramar secured an emergency hearing on a Motion to appoint a Trustee in the Terramar case. Evidence showed that Mr. Mitchell and Mr. Scarfia had withdrawn improper amounts of monies from Terramar while it was under the jurisdiction of the Bankruptcy Court, and there was evidence that books and records of the company had been burned and destroyed. Judge Paskay appointed a Trustee. We then secured an emergency hearing for October 15, to accelerate our Motion to appoint a Trustee in C. M. At the hearing, the attorney for C. M. "gave in" and the Judge indicated that he would appoint a

Trustee. Since C. M. is presently completing several construction contracts out of state, the Judge wanted a Trustee familiar with the construction industry. The Creditors Committee has secured several interested parties, and these names and resumes will be submitted to Judge Paskay for appointment. It is anticipated that Judge Paskay will appoint a Trustee during the week of October 27.

Since that time, I have met with the Trustee for Terramar as well as his attorney. I wanted to emphasize the very strong position taken by the bank that the assets of Terramar should not be sold at foreclosure or distress sale, but rather a well advertised and hopefully negotiated private sale should be effected. Additionally, I urge the Trustee to continue the operation of the Terramar mine in order to maximize the ultimate recovery for all of the creditors. It is anticipated that the consolidation

hearing set for October 29, will be postponed in order to give the new Trustee for C. M. as well as the Trustee for Terramar time to analyze the positions of the various estates.

At the suggestion of Judge Paskay, I met with the office of the United States Attorney for Tampa, where an investigation has begun into the alleged improprieties by the principals of the entities. Depositions have been taken which now have the testimony of five witnesses that Mr. Mitchell and a bookkeeper burned records at the mine, with Mr. Scarfia being a participant. This information is derived from that given to me by the attorney for the Travelers Indemnity Company which had taken the depositions. This information has been turned over to the U.S. Attorney. On October 24, 1986, I met with a special agent of the FBI and gave him all of the information at hand to assist in the FBI's investigation. This investigation clearly benefits the bank in that a complete detailed

analysis of any wrong doings and intercompany transfers will be made at no expense to the bank or the creditors. The deadline for the filing of claims has past, and very few other creditors of C. M. have filed claims in Terramar. Thus, if the consolidation is denied, which I doubt, the bank will still have made a claim in order to participate in the distribution of the assets of Terramar. Additionally, the bank has filed a complaint objecting to the dischargeability of the debt of Mr. Scarfia, which will insure that he cannot escape a judgment on the bank's deficiency. Of course, there is always the problem of collecting any debt from him. A similar complaint will be filed against Mr. Mitchell.

The bank is a member of the Creditors Committee of C. M. Prior to the hearing on the appointment of a Trustee, it was thought that the bank would actively participate in the deliberations of the Committee in order

to make sure that a unified position was taken for all of the creditors of C. M. Now that a Trustee is to be appointed, there is no longer the necessity for the active role of the Committee, which should also lessen the expense to the estate.

At the present time the best course to follow is to monitor the activities of the Trustee in Terramar and the Trustee in C. M. We must insure that the interest of the bank as a substantial creditor is protected by the actions by the Trustee, and if we think otherwise, we should take appropriate action. The Trustee in Terramar is presently investigating the value of the mine, and the feasibility of continuing its operation. The Trustee for C. M. will have to analyze the two remaining jobs in order to determine if they should be terminated.

I believe that as a result of the FBI's investigation, indictments will be issued,

and prosecutions will ensue. Prosecutions will not secure a recovery in money for the bank, but will only assist by the disclosure of the results of the criminal investigation.

Considering the quagmire that exists with respect to the interrelationship of the companies and the assets and liabilities, I feel that at this time we are in the best position possible, under the circumstances. I will continue to monitor everything in order to make sure that the bank's interests are protected. If you have any questions, please let me know.

KASS, HODGES & MASSARI

Charles M. Tatelbaum

10-29-86

Kass, Hodges & Massari

October 22, 1987

Mr. Phil Ruff

NCNB National Bank

600 N. Florida Avenue

Tampa, Florida 33602

Re: CM Systems and Terramar Mining

Dear Phil:

A meeting of the creditors committee of CM Systems was called for this past Friday, October 16, 1987. I attended so as to be able to report to you what was happening since the foreclosure sale, which had been scheduled by Newbern Groves of the Terramar Mine, which had been put off because of a defect in the advertising. The new foreclosure sale is set for October 21, 1987.

A number of the representatives of other banks were in attendance in order to try to determine if there was anything the Trustee in CM could do to put together a package which would eliminate the sale by foreclosure. As you may recall, Newbern Groves has a purchase money mortgage, but this is subordinated to the first mortgage of Florida National Bank. The Florida National Bank representative said that they, to, will be foreclosing on the property, especially if Newbern Groves buys in. They do not believe there are any of the prospective purchasers who had been thinking about buying the mine "waiting in the wings" to buy it once Newbern buys it at foreclosure sale. First National does not want to own the mine, and believes that Newbern will buy it from First National once First National effects a foreclosure sale.

All prospective purchasers who had expressed any interest in the mine apparently

are no longer interested in buying it from the Trustee. We still do not know what efforts were made by the Terramar Trustee to sell the mine, and this will have to be explored at a later time.

The only other major asset is the building, which is owned by CM, located in Pinellas County. It has now come to light that the building is built over a former garbage dump and there is serious concern as to whether or not there may be toxic waste under the ground. Florida National also has a mortgage on this, and they are hesitant to foreclose on it because they do not want to be in the chain of title should they be required to buy in. The CM Trustee had entered into an existing contract on the property, but the purchaser is not attempting to back out because of the garbage dump situation. The CM Trustee will have his attorney investigate the situation to see if a specific performance suit should be

brought. If the sale with the contract purchaser goes through, there will be funds for a distribution to the bank as an unsecured creditor. However, if the sale does not go through, the equity in the property will be negligible and the chances of any recovery are minimal.

As I had previously advised you, the F.B.I. told me that indictments were to have been handed down several weeks ago. From published reports, it appears that the U.S. Attorney's office is very busy, and perhaps this is why nothing has happened. I think that at the present time the only hope of any substantive distribution would be if the F.B.I. investigation turns up anything and the principals of CM and Terramar are willing to testify as to the whereabouts of assets in order to mitigate any liability or sentence from the criminal proceedings. In any event, no distribution appears on the horizon.

Again, I will do nothing in this case until you specifically advise me to do so. Notwithstanding the fact that I think substantial monies have been diverted and are "hidden away," I do not think it would be worthwhile for the bank to advance more funds for legal fees in order to pursue the case further. Any comments will be appreciated.

KASS, HODGES & MASSARI

Charles M. Tatelbaum

10-22-87

Kass, Hodges & Massari

October 30, 1986

Mr. Phil Ruff
NCNB National Bank
600 N. Florida Avenue
Tampa, Florida 33602

Re: CM Systems, Inc. and Terramar Mining

Dear Mr. Ruff:

This letter supplements my prior report to you as to the status of the various matters involving the C. M. and Southern Masonry loans.

On October 29, 1986, I attended the hearing that had been scheduled on our Motion to Appoint a Trustee and our Motion for Substantive Consolidation. The Trustee Motion

as such was moot since the Court had already agreed to appoint a Trustee at the emergency hearing that was held. Our office had found one possible candidate for Trustee as did the attorney for Holiday Bank. Both of these names will be submitted to Judge Paskay for consideration as Trustee. In my estimation, either one would do just as well. We expect to have the Trustee appointed by Friday, October 30, 1986.

The attorney for C. M. advised the Judge that all of the employees of C. M. have resigned as did Mr. Scarfia. Apparently the two major jobs which were underway in North Carolina and New Jersey were not as major as thought, and apparently the operations have shut down. It will be up to the Trustee to decide what to do once an investigation has been made as to the C. M. operations.

With respect to the Motion for Substantive Consolidation, the Judge agreed

with me that it would be in everyone's best interest to put off the matter until the Trustee for Terramar and the Trustee for C. M. could effect their independent investigations, and then decide what to do. The Judge said that he will reset the hearing at such time as either we requested or either or both of the Trustees requested.

I am attaching a copy of the initial report of the Terramar Trustee. Unfortunately, it says very little and you can read it for yourself. It is my understanding that a proposal is forthcoming from an independent management firm which specializes in mines of this nature to see if the mine can be reopened. Additionally, I have urged the Trustee to speak with a liquidator to see how the mine can be best liquidated in the event that it is not operated.

The Judge did allow the attorney for Terramar and Max Mitchell to withdraw from

the case. The attorney had filed a Motion based upon his irreconcilable differences with his client, which I understand to be based upon the alleged improprieties. The corporation will not need an attorney because a Trustee has been appointed, and Mr. Mitchell will simply to have to find one within 15 days.

As to Mr. Scarfia, on October 21, 1986, he quietly converted his case from Chapter 11 to Chapter 7. I gather this was done in order to permit him to employ criminal counsel without authority or approval of the Bankruptcy Court. However, it will be interesting to note and determine when the criminal attorney was paid and with what funds. Within the next several weeks, I will urge the Trustee for C. M. to examine Scarfia to look for these funds. Additionally, we should make sure that the attorney for Scarfia himself in Chapter 7 takes the necessary steps to protect the interests of

all of the Creditors. I do not know if the Judge will reopen the time for filing objections to dischargeability of debts. Our Complaint has already been filed, and although we will probably have to re-serve it on the Chapter 7 Trustee, it is still set, and assuming that we can prove what we know, the debt of Mr. Scarfia will not be discharged by his Chapter 7.

The Travelers Insurance Company sought to hold Mr. Scarfia in contempt for failing to answer certain questions as the continuation of the Rule 2004 Examination. Specifically, Mr. Scarfia, on the advice of counsel, took the fifth amendment to every questions except for his name and his address, and refused to produce documents. The Judge ordered Travelers to file a Motion to compel the response, and the Judge would review it.

The Travelers attorney also sought to take the depositions of two of the attorneys for C. M. The attorneys have resisted this claiming that the scope of the examination was too broad and it would violate the attorney-client privilege. Uniquely, in bankruptcy, there is a line of cases that says that the Trustee may waive the attorney-client privilege in bankruptcy. The attorney for Terramar's Trustee has said that the Trustee will waive the privilege in the Terramar case. I assume that the Trustee in the C. M. case will do so as well. As a result, it will be very interesting to see what happens if these attorneys are required to turn over information concerning the activities that took place during the Chapter 11 proceeding, and even before that period of time. This issue on discovery will take some time to clear up, but it will be done by others with the bank receiving the benefit of any information that is received.

I have given your name to a representative of the FBI, and I assume by this time you have been contacted. Needless to say, I think it behooves the bank to fully cooperate with the FBI in the investigation. Others are doing so, and I think that a very substantial case will be built involving the claimed improprieties by the various individuals and entities.

As further matters develop, I will keep you advised.

KASS, HODGES & MASSARI

Charles M. Tatelbaum

10-30-86

Kass, Hodges & Massari

November 6, 1986

Mr. Phil Ruff
NCNB National Bank
600 N. Florida Avenue
Tampa, Florida 33602

Re: C. M. Systems and Southern Masonry Contractors, Inc.

Dear Phil:

As a supplement to my previous reports, I attended the adjourned meeting of creditors on Southern Masonry on November 4, 1986. An attorney from the law office representing Southern Masonry appeared without any representative of his client. This was not the attorney who appeared at the prior meeting, and this was the senior partner in the somewhat small firm.

He stated that Mr. Scarfia had written him and advised that he had resigned as president and as a director of the company, and refused to appear. He also stated that he tried to get in touch with the person who testified at the prior hearing, and he, too, refused to appear.

I then requested that the trustee have the court issue a show cause order to Mr. Scarfia. The trustee was reluctant to do so as he has stated at this meeting and at the prior meeting that unless he knew there were going to be assets in the case from which he could recover compensation, he did not want to take the time and energy to become deeply involved in the case. I again reminded him of his fiduciary obligation to collect the books and records, as I had done in various correspondence to him, which to this date has remained unanswered. He again reiterated his

position that he did not intend to do anything unless there appeared to be assets.

While we do not know what the situation is with Southern Masonry, it appears clear that it was a conduit for money that was coming directly by way of loans from the bank, as well as money being filtered through C. M. In reviewing my files for the F.B.I. investigation, it appears that money went from C. M. to Southern Masonry, and nobody knows where it went from there. Any diversion of funds through Southern Masonry would be a cause of action of the trustee, and this should be pursued.

While I am usually reluctant to do so, in this case I must file a motion with the Bankruptcy Court to have the judge compel the trustee to do his job. While in Baltimore, I was a panel trustee from the inception of the Bankruptcy Code in 1979, and was an appointed trustee since 1966. All trustees know that

they many times have to "take the good with the bad" which means handling a minimal asset case because it has been directed to him. We cannot and should not tolerate an attitude of this nature by a trustee merely because he is going to have to do some work, and there is a question as to how he is to be paid.

I will file the motion immediately, and hopefully even before a hearing and it will prompt the trustee into doing something.

KASS, HODGES & MASSARI

Charles M. Tatelbaum

11-06-86

APPENDIX 12

UNITED STATES BANKRUPTCY COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

In the Matter of:

MICHAEL J. SCARFIA Case No. 86-1642

Debtor(s) Chapter 7 **sic**

THE TRAVELERS INDEMNITY COMPANY

Plaintiff(s) Adversary

v. Proceeding No. 86-571

MICHAEL J. SCARFIA

Defendant(s)

ANSWER AND AFFIRMATIVE DEFENSES

TO SECOND AMENDED COMPLAINT OBJECTING

TO DISCHARGEABILITY OF DEBT

The Debtor, MICHAEL J. SCARFIA ("SCARFIA"), by and through his undersigned attorneys, files this, his Answer and Affirmative Defenses to Second Amended Complaint Objecting to Dischargeability of Debt, filed by TRAVELERS INDEMNITY COMPANY,

and would show unto this Honorable Court the following:

A. The Defendant, by reason of his rights against self-incrimination under the 5th Amendment to the United States Constitution hereby invokes his privilege against self-incrimination and on this basis, denies all allegations of the Amended Complaint.

B. Further, the Defendant expressly reserves his rights under the 5th Amendment to the United States Constitution and interposes the following Affirmative Defenses only as they are required to be filed under the Bankruptcy Rules.

FIRST AFFIRMATIVE DEFENSE

C. The Plaintiff is barred from recovery herein, as it has failed to mitigate it damages, and in fact, has aggravated its damages by failing to properly analyze and treat claims as they are made under the Plaintiff's bonds. Additionally, to the extent that attorneys' fees are claimed as

damages by the Plaintiff, same are clearly excessive, and have in no way been incurred by the Plaintiff as a result of any act or omission of the Defendant for which such claims would be non-dischargeable under 11 U.S.C. §523.

SECOND AFFIRMATIVE DEFENSE

D. The Plaintiff is barred from recovery herein, as it did not extend credit, or lend money to the Defendant, but rather, merely issued bonds to C.M. SYSTEMS, INC., a third party.

THIRD AFFIRMATIVE DEFENSE

E. The Plaintiff is barred from recovery herein, as it fails to allege in its Complaint, and indeed, cannot establish in any way that the Defendant obtained any benefit by way of a renewal, or extension of credit from the Plaintiff in this case.

FOURTH AFFIRMATIVE DEFENSE

F. The Plaintiff is barred from recovery herein, as it did not reasonably rely upon any representations by the

Defendant in this case in issuing construction bonds.

FIFTH AFFIRMATIVE DEFENSE

G. The Plaintiff is barred from any and all recovery for attorneys' fees against the Defendant, as such attorneys' fees are not recoverable under 11 U.S.C. §523.

SIXTH AFFIRMATIVE DEFENSE

H. The Plaintiff is barred from recovery herein, as, by making payment under its bonds, it has created the debt for which it seeks recovery against the Defendant in this case and therefore, the Plaintiff is not entitled to any relief under 11 U.S.C. §523.

SEVENTH AFFIRMATIVE DEFENSE

I. There has been an accord and satisfaction of any and all claims from the Plaintiff in this case against the Defendant, as the Plaintiff took an irrevocable assignment of any and all rights and liabilities as to all bonded jobs from C.M. SYSTEMS, INC. prior to the date of the filing of the Petition herein, and therefore, an accord and

satisfaction was reached as to claims against the Defendant prior to the date of the filing of the Petition.

EIGHTH AFFIRMATIVE DEFENSE

J. The Plaintiff is barred from recovery herein, as it has improperly pled its cause of action, mixing causes of action for denial of discharge and discharge of debt.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer and Affirmative Defenses to the Second Amended Complaint Objecting to Dischargeability of Debt has been furnished by U.S. Mail to David Steen, Esquire, 505 South Magnolia Avenue, Tampa, FL 33606; and Daryl J. Brown, Esquire, ABEL, BAND, BROWN, RUSSELL & COLLIER, P.A., P.O. Box 49948, Sarasota, FL 33578-3948, this 25th day of April, 1987.

BATTAGLIA, ROSS, HASTINGS,

DICUS & ANDREWS, a

Professional Association

LEO H. MEIROSE, JR., ESQ.

Attorney for Defendant

04-25-87

APPENDIX 13

UNITED STATES BANKRUPTCY COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

In the Matter of:

MICHAEL J. SCARFIA Case No. 86-1642

Debtor(s) Chapter 11

THE TRAVELERS INDEMNITY COMPANY

Plaintiff(s) Adversary

v. Proceeding No. 86-571

MICHAEL J. SCARFIA

Defendant(s)

SECOND AMENDED COMPLAINT

OBJECTING TO DISCHARGEABILITY OF DEBT

THE TRAVELERS INDEMNITY COMPANY, (hereinafter "TRAVELERS"), Plaintiff, by and through its undersigned attorneys, does hereby file this Second Amended Complaint Objecting to Dischargeability of Debt, and says that:

1. This is an action objecting to dischargeability of debt pursuant to §523 of the Bankruptcy Code and Rule 7001 of the Bankruptcy Rules of Practice and Procedure.

2. On April 25, 1986, the Defendant, MICHAEL J. SCARFIA (hereinafter "SCARFIA") filed a Voluntary Petition for Reorganization Under Chapter 11 of the United States Bankruptcy Code; and the case was converted to Chapter 7 on October 21, 1986.

3. At all times material herein, C. M. SYSTEMS, INC. (hereinafter "C. M.") was a Florida corporation operating as a general contractor. Its stock was owned either by Defendant, SCARFIA; alone or together with HAROLD CROFT; and SCARFIA was its President. SCARFIA was also President and owner of the stock of SOUTHERN MASONRY AND CONCRETE, INC. (hereinafter "SOUTHERN MASONRY"). In addition, SCARFIA was an officer and director of TERRAMAR MINING CORP. (hereinafter "TERRAMAR"); and, as trustee, a shareholder.

4. Between November, 1983 and December, 1986, the Plaintiff issued construction bonds, as surety, for C. M., as Principal. These bonds were issued at the request of C. M., acting through its agents. These agents of C. M. included SCARFIA, MAX W. MITCHELL and JOHN RAWLS. JOHN RAWLS was the chief accountant and an officer of C. M.

5. As a prerequisite to issuing construction bonds for C. M., the Plaintiff required disclosure of financial information on C. M., its affiliates and shareholders. The information requested included, but was not limited to, financial statements; bank loan information; schedules of work planned, in progress and work completed; investments; loans to insiders; resumes of significant employees; income tax returns; and other financial data.

6. Beginning in 1984, the Defendant engaged in a conspiracy to defraud the Plaintiff. The fraud was designed to obtain construction bonds for C. M. by giving false

financial information. The conspiracy involved SCARFIA, C. M., JOHN RAWLS and others.

7. In furtherance of the fraud, the Defendant concealed or misrepresented the following facts from the Plaintiff:

a. C. M. used is credit and funds to capitalize TERRAMAR, but received nothing in return;

b. SCARFIA transferred most of his personal assets to family members through the use of trusts totally controlled and funded by SCARFIA, to avoid claims of creditors;

c. TERRAMAR issued stock to MITCHELL, members of MITCHELL'S family, and to a trust created by SCARFIA known as the Mariah Trust, during March of 1985;

d. SCARFIA was an officer of TERRAMAR;

e. SOUTHERN MASONRY, the stock of which is owned by SCARFIA, received loans totalling approximately

$1,000,000.00 from C. M. in 1984 and 1985;

f. C. M. borrowed approximately $2,500,000.00 from banks in 1985;

g. C. M. financed approximately $3,000,000.00 of equipment for TERRAMAR; and loaned in excess of $1,000,000.00;

h. SOUTHERN MASONRY operated at a loss in 1984; and

i. Neither C. M. or SOUTHERN MASONRY had sufficient funds to operate, and were insolvent in 1984, 1985 and 1986.

8. In furtherance of the fraud, Defendant caused to be prepared and submitted to TRAVELERS false written financial data, false oral information, and other misrepresented the foregoing facts. The fraud included the concealment and destruction of financial records in March, 1986, and at other times; and the issuance of "audited statements" which were not, in fact, audited.

9. The Defendant knew that the information was false when it was provided to the Plaintiff.

10. The Defendant provided false information to TRAVELERS with the willful intent to deceive Plaintiff; and for the purpose of obtaining construction bonds for C. M. and SOUTHERN MASONRY. This would enable the Defendant to obtain construction funds from bonded jobs, both directly and through TERRAMAR.

11. At the time C. M. applied for construction bonds, the Defendant knew or had reason to know that C. M. would not have sufficient funds to pay subcontractors and suppliers on such jobs; nor would it have sufficient funds to complete such jobs.

12. C. M. abandoned its bonded jobs without completing the work. Also, it failed to pay subcontractors and suppliers, even though its was paid sufficient monies to complete the work and pay subcontractors and

suppliers. However, the funds were siphoned to TERRAMAR, SOUTHERN MASONRY and SCARFIA.

13. SCARFIA breached his fiduciary duty as President of C. W. during the Chapter 11 of C. M. by using property of the estate of C.M. to pay pre-petition claims for which he was personally liable; by taking unauthorized salaries; and by repaying loans to himself.

14. As a result of the foregoing, TRAVELERS has incurred damages in the form of bond losses for any amount in excess of $3,700,000.00. Additional damages are expected in amounts in excess of $1,000,000.00.

15. The Plaintiff reasonably relied upon the information provided by MITCHELL. TRAVELERS would not have issued the bonds for C. M. but for the false information provided by the Defendant.

WHEREFORE, THE TRAVELERS INDEMNITY COMPANY prays that this Court issue a Final Judgment against Defendant for damages and attorneys fees; provide that such judgment is

nondischargeable and for such other and further relief as is just.

DATED this 10th day of March, 1987.

DAVID W. STEEN, P.A.
DAVID W. STEEN, ESQUIRE
Attorney for Travelers

and

ABEL, BAND, BROWN, RUSSELL & COLLIER, P.A.
DARYL J. BROWN, ESQUIRE
Attorney for Travelers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Second Amended Complaint Objecting to Dischargeability of Debt has been furnished, by U. S. Mail, to Leo H. Meirose, Jr., Esquire, BATTAGLIA, ROSS, HASTINGS, DICUS & ANDREWS, P.A., 980 Tyrone Boulevard, Post Office Box 41100, St.

Petersburg, Florida 33743 this 10th day of March, 1987.

DAVID W. STEEN, ESQUIRE

Attorney for Travelers

03-10-87

APPENDIX 14

APPENDIX 15

APPENDIX 16

11 U.S.C. § 523

§ 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required--

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and

after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing--

(i) that is materially false;

(ii) respecting the

debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash

advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act (15 USC 1601 et seq.);

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt

under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--

(A) such debt is assigned to another entity,

voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty--

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or

nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless--

(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) for death or personal injury caused by the debtor's operation of motor vehicle if such operation was unlawful because the debtor was intoxicated from using

alcohol, a drug, or another substance; or

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act.

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act

of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union; or

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act

of 1965 (20 USC 1087-3), or under section 733(g) of the Public Health Service Act (42 USC 294f) in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6)), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of a depository institution or insured credit union shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

APPENDIX 17

Rule 7001. Scope of Rules of Part VII.

An adversary proceeding is governed by the rules of this Part VII. It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11, chapter 12 or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, 12, or 13 plan,

(9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 U.S.C. § 1452.